

ARKANSAS COURT OF APPEALS

DIVISIONS I, III, and IV

No. CACR08-170

AMANDA GAIL HOLT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 31, 2008

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT, SEVENTH DIVISION
[NO. CR-2007-86]

HONORABLE BARRY SIMS, JUDGE

AFFIRMED IN PART

JOHN MAUZY PITTMAN, Chief Judge

1. CRIMINAL LAW — EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT’S CONVICTION OF POSSESSION OF DRUG PARAPHERNALIA.—Sufficient evidence supported appellant’s conviction for possession of drug paraphernalia with intent to manufacture; appellant admitted that she knew that the manufacture of methamphetamine was being carried out at the residence; it was also significant that appellant stated that she had been sleeping immediately before police appeared; however, the only place suitable for sleeping in the trailer was the bedroom where methamphetamine was being manufactured, and the bed was covered with and surrounded by substances and paraphernalia used in the manufacture of methamphetamine; given that many of the items were in plain view or found with appellant’s children’s clothing, and that methamphetamine was actually being manufactured at the time of appellant’s arrest, the appellate court held that evidence was sufficient to show that appellant knew that the items were drug paraphernalia.
2. CRIMINAL LAW — EVIDENCE SUPPORTED APPELLANT’S CONVICTION OF KNOWINGLY PERMITTING A CHILD TO BE EXPOSED TO METHAMPHETAMINE.—Evidence supported appellant’s conviction for knowingly permitting a child to be exposed to methamphetamine, and the evidence was sufficient to support the finding that appellant intended to manufacture methamphetamine; the appellate court held that substantial evidence supported appellant’s conviction of possession of drug paraphernalia with intent to manufacture; furthermore, laboratory analysis of the paraphernalia verified the presence of both pseudoephedrine and actual methamphetamine in glass vials found in the residence that were used in the manufacturing process; pursuant to Ark. Code Ann. § 5-64-401(g)(1), the presence of these substances on the paraphernalia gave rise to a presumption that appellant engaged in conduct constituting a substantial step in the manufacture of methamphetamine.

William R. Simpson, Jr., Public Defender, *Kent C. Krause*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, and *Misty Steele*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar, for appellant.

Dustin McDaniel, Att’y Gen., by: *Karen Virginia Wallace*, Ass’t Att’y Gen., for appellee.

We affirm appellant’s convictions for possession of drug paraphernalia with intent to manufacture and for three counts of exposing a child to a chemical substance or methamphetamine.

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine. Ark. Code Ann. § 5-64-403(c)(5)(A) (Supp. 2007). It is likewise unlawful for any adult, with the intent to manufacture methamphetamine, to knowingly cause or permit a child under eighteen years of age to be exposed to, ingest, inhale, or have any contact with a chemical substance or methamphetamine. Ark. Code Ann. § 5-27-230(b)(1) (Repl. 2006). For purposes of this statute, “chemical substance” means a substance intended to be used as a precursor in the manufacture of methamphetamine, or any other chemical intended to be used in the manufacture of methamphetamine. Ark. Code Ann. § 5-27-230(a)(1)(A) (Repl. 2006).

Appellant argues that the evidence is insufficient to support these convictions. Our standard of review for a sufficiency challenge is as follows:

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. We affirm a conviction if substantial evidence exists to support it. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to

speculation or conjecture.

Circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. Whether the evidence excludes every other hypothesis is left to the jury to decide. The credibility of witnesses is an issue for the jury and not the court. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence.

Cluck v. State, 365 Ark. 166, 170-71, 226 S.W.3d 780, 783-84 (2006) (internal citations omitted).

Appellant expressly concedes on appeal that there is substantial evidence that methamphetamine was manufactured in the residence at 4108 Vinson Road, a small mobile home, on September 21, 2006; that she was present in the residence when the methamphetamine was being manufactured; and that she knew that methamphetamine was being manufactured. There was, in addition, substantial evidence that appellant had been staying at the residence for a few weeks. On September 21, 2006, a police officer responded to a report that three small children were playing in the road in front of the residence. He observed appellant's three children—ages four, three, and not yet two—playing outside when he arrived. They were only semi-dressed and smelled of methamphetamine. When the officer approached the residence, he detected the strong chemical odor associated with methamphetamine manufacture emanating from within and permeating the air around the residence. The officer knocked on the door, which was answered by Michael Hogue. Hogue came out on the front porch and closed the door. The officer asked to speak to appellant, and Hogue went back inside the residence to get her. The officer heard movement coming from the bedroom to the right

(the only room in the residence with a bed), and appellant came to the door. Asked if she knew where her children were, appellant said that she did not know they were up yet because she had been asleep.

The officer, concerned about the chemical odor, obtained Hogue's permission to search the residence. The residence was filthy and contained only one bed. The bed was located in the bedroom to the right, where officers discovered a functioning methamphetamine lab with a reaction in process. Items found in the bedroom included a razor blade and plastic bag on the dresser, hypodermic needles, tubing, coffee filters, a glass smoking pipe, a salt container stained with iodine as commonly found in methamphetamine labs, a large cardboard box containing boxes of matches, a pair of scissors, a gas torch, a hot plate that was warm to the touch, and a black satchel containing hydrochloric acid generator together with bottles of liquid in which the pill-soak portion of the manufacturing process was then taking place. Many of these items were in plain view. The satchel was found under the headboard of the bed after the mattresses were removed. Articles of children's clothing were found in a dresser drawer that also contained drug paraphernalia. Appellant's children were the only children residing in the residence. The children were decontaminated at a hospital, where they were diagnosed as neglected because of exposure to drug use and manufacturing. Hair follicle tests showed that all three of the children tested positive for exposure to methamphetamine and that the youngest child appeared to have actually ingested cocaine as well.

Appellant argues that, because she was not the sole occupant or owner of the residence, the evidence is insufficient to show that she possessed the drug paraphernalia. We do not

agree.

In order to prove possession, it is not necessary to prove literal physical possession of contraband. *See Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). Contraband is deemed to be constructively possessed if the location of the contraband was under the dominion and control of the accused. *See Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). Although constructive possession may be implied when contraband is in the joint control of the accused and another person, joint occupancy, standing alone, is not sufficient to establish possession or joint possession. *Abshire v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). The State is also required to establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *Id.*

Loy v. State, 88 Ark. App. 91, 101, 195 S.W.3d 370, 374-75 (2004). Here, appellant admits that she knew that the manufacture of methamphetamine was being carried out at the residence. We also think it significant that appellant stated that she had been sleeping immediately before police appeared. However, the only place suitable for sleeping in the trailer was a bedroom where methamphetamine was being manufactured, and the bed was covered with and surrounded by substances and paraphernalia used in the manufacture of methamphetamine. A jury is not required to abandon common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from such improbable explanations of incriminating conduct. *See Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Given that many of the items were in plain view or found with her children's clothing, and that methamphetamine was actually being manufactured at the time of her arrest, we hold that the evidence is sufficient to show that she knew that the items were drug paraphernalia and that she exercised care, control, and management over them. On this basis, we affirm appellant's conviction of possession of drug paraphernalia with intent to manufacture.

We also hold that the evidence supports appellant's convictions of knowingly permitting a child to be exposed to methamphetamine. Appellant's admission that she knew methamphetamine was being manufactured, together with the evidence already recited, is sufficient to prove the element of knowing exposure to methamphetamine. However, pursuant to Ark. Code Ann. § 5-27-230(b)(1) (Repl. 2006), the State must also prove that appellant did so with the intent to manufacture methamphetamine. We hold that the evidence is sufficient to support the finding that appellant intended to manufacture methamphetamine. We have held, *supra*, that substantial evidence supports appellant's conviction of possession of drug paraphernalia with intent to manufacture. Furthermore, laboratory analysis of the paraphernalia verified the presence of both pseudoephedrine (a methamphetamine precursor) and actual methamphetamine in glass vials found in the residence that were used in the manufacturing process. Pursuant to Ark. Code Ann. § 5-64-401(g)(1) (Supp. 2007), the presence of these substances on the paraphernalia gives rise to a presumption that the possessor (in this case, appellant) has engaged in conduct constituting a substantial step in the manufacture of methamphetamine. We cannot say that the fact-finder was, on this record, required to find that appellant had rebutted the presumption by submission of evidence sufficient to create a reasonable doubt that she attempted to manufacture methamphetamine. *See* Ark. Code Ann. § 5-64-401(g)(2) (Supp 2007).

Affirmed in part.

GLADWIN, ROBBINS, VAUGHT, and HEFFLEY, JJ., agree.

GLADWIN, J., concurs.

HART, MARSHALL, BAKER, and HUNT, JJ., dissent.

ROBERT J. GLADWIN, Judge, concurring. Although I believe that appellant's conviction for manufacturing a controlled substance is not supported by substantial evidence, I believe the other counts on which the appellant was convicted can be affirmed.

Appellant was charged with possession of drug paraphernalia with the intent to manufacture. It is unlawful for a person to use, or possess with the intent to use, drug paraphernalia to manufacture methamphetamine. Ark. Code Ann. § 5-64-403(b)(5)(A) (Supp. 2007). Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is constructively possessed. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). Constructive possession can be implied when the contraband is in the joint control of the accused and another. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). Joint occupancy, however, is not sufficient in itself to establish possession or joint possession. *Id.* There must be some additional factor linking the accused to the contraband, and the State must show additional facts and circumstances indicating the accused had knowledge and control of the contraband. *See Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

In *Walley*, the appellant was convicted of possession of drug paraphernalia with intent to manufacture. The jury was presented with evidence of an operational methamphetamine lab in the kitchen of Walley's residence. During a search of the residence, law enforcement agents found numerous items used in the manufacturing of methamphetamine. Walley argued that

there was no additional evidence linking him to the contraband. Our supreme court held that the jury could reasonably conclude that Walley knew of the existence of the drugs and drug manufacturing paraphernalia in the kitchen of the residence. The jury did not have to believe Walley's testimony that he did not notice the smell in the house, did not notice the stains in the kitchen, did not notice the black plastic on the windows, and did not know what was in the locked cabinets. *Walley v. State, supra*.

In *Fitting v. State*, 91 Ark. App. 283, 229 S.W.3d 586 (2006), the appellant was also convicted of possession of drug paraphernalia with intent to manufacture. The testimony showed that Fitting stayed periodically at the residence of Eddie McCann. McCann testified that Fitting and a woman were "cleaning up a cook" when the police arrived. A police officer testified that Fitting and a woman were walking toward the living room from the back area of the house, although he could not say specifically from which room they came. In the house, police found a number of components for a methamphetamine lab. Fitting argued that the State provided no evidence that he was in actual or constructive possession of drug paraphernalia with the intent to manufacture. This court held that the evidence tended to connect Fitting with the offense charged. We stated that, among other factors, the police officer testified that Fitting and the woman were walking to the living room from the back area of the house, thus Fitting was in close proximity to the manufacturing items that were seized.

In our case, Officer Howard testified that the only sound he heard was movement coming from the bedroom where the methamphetamine lab was located. Further, appellant said she had been sleeping, and the only bed in the house was in the bedroom. There was a strong

chemical odor coming from the residence. Ms. Holt had lived there for at least two weeks. Additionally, the dresser in the bedroom contained children's clothes and a syringe.

Jurors need not view each fact in isolation but rather may consider the evidence as a whole. *Kelley v. State*, 103 Ark. App. 110, ___ S.W. 3d ___ (2008). The jury is entitled to draw any reasonable inference from the circumstantial evidence to the same extent it can from direct evidence. *Id.* Jurors are instructed that they are allowed to draw upon common sense to infer intent from the circumstances. *See DeShayer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). I believe that this evidence connects the appellant with constructive possession of the working methamphetamine lab.

Appellant next argues that there is insufficient evidence that she kept or maintained a drug premises. She argues that her mere presence alone is insufficient to support the verdict. It is unlawful for a person knowingly to keep or maintain any store, shop, warehouse, dwelling, building or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance, including methamphetamine. Ark. Code Ann. § 5-64-402(a)(2) (Repl. 2005). There is no doubt that appellant resided in a dwelling that was resorted to by persons to obtain methamphetamine. The only question was did appellant "keep or maintain" this dwelling. The terms "keep or maintain" are not defined in the statute, and our supreme court has not interpreted this statute. It is clear that something less than actual ownership is sufficient for a person to keep or maintain a drug premises. *See Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994); *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). Webster's II dictionary defines "keep" as "to remain in a given state: stay." "Maintain"

is defined as “to keep an existing state.” It is clear that appellant lived in the dwelling and kept it in its existing state. This is sufficient to find that appellant kept or maintained a drug premises.

Finally, appellant argues that the State failed to introduce substantial evidence that she, with the intent to manufacture methamphetamine, permitted her children to be exposed to a chemical substance or methamphetamine. Any adult who with the intent to manufacture methamphetamine, knowingly causes or permits a child to be exposed to, ingest, inhale or have any contact with a chemical substance or methamphetamine is guilty of a Class C felony. Ark. Code Ann. § 5-27-230(b)(1)(Repl. 2006). Appellant argues that there is no evidence that she had any intent to manufacture methamphetamine. The statute provides that intent may be demonstrated by the substance’s use, quantity, manner of storage, or proximity to another precursor or equipment used to manufacture methamphetamine. In this case an entire working methamphetamine lab was found in the bedroom where children’s clothes were found. The various chemicals were found in close proximity to the lab, and other bags of chemicals were found in the other end of the residence. Again, the close proximity of the various pill soak and bi-layer liquids to the rest of the lab show a close proximity. Under the statute, there is enough to show an intent to manufacture.

It should be noted that I do not read Arkansas Code Annotated section 5-27-230(b)(1) to be an enhancement statute. I believe that this is a separate, stand-alone violation against the family with an enhancement clause if the child suffers physical injury.

EUGENE HUNT, Judge, dissenting. The majority’s evaluation of this case leads it to

affirm the conviction of appellant for possession of drug paraphernalia with intent to manufacture methamphetamine and exposing a child to methamphetamine. I disagree. I would reverse and dismiss due to lack of evidence.

According to Arkansas Code Annotated section 5-64-403(c)(5)(A) (Supp. 2007), it is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine. Appellant argues that there was insufficient evidence linking her to drug paraphernalia. In this case, the contraband was located in a trailer that appellant and another adult occupied. Beyond appellant's presence, there had to be some other factor linking appellant to the contraband. *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). The State's case was devoid of this linking factor. There was no proof of possession or constructive possession. Possess means to exercise actual dominion, control or management over a tangible object. Ark. Code Ann. § 5-1-102(15) (Supp. 2007). One may possess an object without touching the object. *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981). Dominion includes the right to possess. *Id.* The principles governing possession of contraband are well established. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). There was no proof of actual or constructive possession of drug paraphernalia. No witness testified that they saw appellant handle any item used in making methamphetamine. The State offered no fingerprints that connected appellant to any of the drug paraphernalia.

Appellant was also found guilty of three counts of exposing a child to a chemical substance or methamphetamine. Arkansas Code Annotated section 5-27-230(b)(1) (Repl. 2006), state: "Any adult who, with the intent to manufacture methamphetamine, knowingly

causes or permits a child to be exposed to , ingest, or have any contact with a chemical substance or methamphetamine is guilty of a Class C felony.” Intent can be demonstrated by the substance’s use; quantity, manner of storage; or proximity to another precursor or equipment used to manufacture methamphetamine. *Id.* § 5-27-230(a)(1)(B). Appellant concedes that evidence was presented that she knowingly exposed her three children to the manufacture of methamphetamine. However, appellant argues that the State failed to prove the requisite intent. The statute at issue require some involvement by appellant. As indicated above, there is nothing linking appellant to the methamphetamine lab discovered at the trailer other than her presence. There was no evidence that appellant took part in the manufacture of the drug.

The majority has affirmed appellant’s conviction of exposure of a child to a chemical substance. Intent is required to sustain such a conviction. There is no evidence that the majority can point to that shows intent. The statute requires that , with the intent to manufacture, one knowingly causes or permits a child to be exposed to a chemical substance. The fact that the children’s hair tested positive for methamphetamine does not prove intent. While it is true that appellant and Hogue jointly occupied the trailer, such fact alone will not suffice to sustain a conviction.

The problem of joint occupancy arises because of the rule that when joint occupancy is the only evidence the State has, there must be some additional link between the accused and the contraband. On the other hand, if the State is proving a case through constructive possession of contraband by the occupant of a dwelling, it is not required in the first instance

to disprove joint occupancy. If, however, evidence is presented that indicates joint occupancy and occupancy is the only evidence the State offers to prove possession, it must either provide the necessary link or proof. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982). The State has failed to show any connection to the exposure of the children to methamphetamine beyond appellant's presence.

There are no facts other than joint occupancy to connect appellant to Hogue's crimes. More is required. Therefore, I respectfully dissent.

HART, MARSHALL, and BAKER, JJ., join in this dissent.